

FEDERAL CIRCUIT COURT OF AUSTRALIA

PAYAL v MINISTER FOR IMMIGRATION & ANOR

[2017] FCCA 2117

Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – refusal of a partner visa – interlocutory dismissal of show cause application – no arguable case of jurisdictional error.

Legislation:

Federal Circuit Court Rules 2001 (Cth)

Migration Act 1958 (Cth), ss.5F, 359AA

Migration Regulations 1994 (Cth)

Applicant:	PAYAL PAYAL
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 3468 of 2016
Judgment of:	Judge Driver
Hearing date:	4 September 2017
Delivered at:	Sydney
Delivered on:	4 September 2017

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Ms E Warner Knight of the Australian
Government Solicitor

INTERLOCUTORY ORDERS

- (1) Pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), the application is dismissed.
- (2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$3,606.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3468 of 2016

PAYAL PAYAL

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. The applicant, Ms Payal, seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 11 November 2016. The Tribunal affirmed a decision of a delegate of the Minister (delegate) not to grant Ms Payal a temporary partner visa. Ms Payal applied for the visa on 14 November 2012 on the basis of her relationship with her sponsor. As noted by the Tribunal in its decision at [2]¹, primary criteria for the visa must be satisfied by at least one applicant. Other members of the family unit, if any, need to satisfy only the secondary criteria. The Minister's delegate refused to grant the visa on the basis that Ms Payal did not satisfy clause 820.211(2)(a)

¹ Court Book (CB) 396.

of the *Migration Regulations 1994* (Cth) because it was determined that she was not the spouse of the sponsor as defined under s.5F of the *Migration Act 1958* (Cth) (Migration Act).

2. The matter most recently came before the Tribunal following proceedings in this Court on 4 April 2016 requiring the Tribunal to reconsider compelling reasons for not applying Schedule 3 criteria due to jurisdictional error. Ms Payal appeared before the Tribunal on 11 November 2016 and gave evidence and presented arguments. Her sponsor did not attend that hearing. At the hearing, the Tribunal questioned Ms Payal about the absence of the sponsor.
3. In accordance with s.359AA of the Migration Act, the Tribunal put particulars of information to Ms Payal at the hearing concerning the travel of the sponsor overseas. Ms Payal responded at the hearing admitting that her partner had left home for periods of time in 2015 and 2016, and he had not told her where he was going. She thought he was going away for work. The Tribunal put to Ms Payal what it saw as inconsistencies in her evidence compared with her initial statement. The Tribunal also considered whether there were compelling reasons for the waiver of the Schedule 3 criteria, which apply because of the gap between her visa application and when she last held a substantive visa.
4. The Tribunal considered in its decision from [16]², whether Ms Payal and her sponsor had a mutual commitment to a shared life to the exclusion of all others. The Tribunal concluded that they were not in a genuine and continuing relationship, and was not satisfied that they lived together and do not live separately apart on a permanent basis. The Tribunal noted that the sponsor did not attend the hearing because he had gone to stay with friends. The Tribunal further noted the information about the sponsor's travel overseas, which had been put to Ms Payal pursuant to s.359AA of the Migration Act.
5. The Tribunal noted at [22] the change in Ms Payal's evidence over time concerning the absence of the sponsor. At [23]³, the Tribunal concluded that, based on Ms Payal's evidence at the Tribunal hearing and the documentary evidence of the sponsor having spent 12 months

² CB 397.

³ CB 398.

in the last two years overseas without her, the Tribunal was not satisfied that she and the sponsor had been living together in a committed spousal relationship.

The present proceedings

6. These proceedings began with a show cause application filed on 7 December 2016. Ms Payal continues to rely upon that application. The grounds in the application, in my view, do no more than assert that Ms Payal qualifies for the class of visa she sought. The grounds are as follows:

1. *Satisfying the cl 820.211 of Migration Regulation 1994.*
2. *Satisfying the Part 820 of Sch2 to Migration Reg 1994.*
3. *Compelling reasons exists meeting the Sch3 criteria of Migration Act 1958.*
4. *Meeting the subsection 5f(3) of Act.*

(errors in original)

7. The only evidence I have before me is the court book filed on 1 May 2017.
8. Neither party prepared written submissions prior to today's show cause hearing. I invited oral submissions from Ms Payal, who referred to special circumstances which in her view warranted waiving the Schedule 3 criteria.
9. Ms Payal says that she fell pregnant in 2014 but there were problems and she suffered a miscarriage. She says that she suffered depression following those events. It is not clear from the court book whether there is a medical basis for those assertions, although Ms Payal referred to a document⁴. In that document, the medical practitioner did not rule out an ectopic pregnancy as at 1 April 2014.
10. Be that as it may, the Tribunal decision did not turn on the waiver of the Schedule 3 criteria. The Tribunal decision turned on the eligibility of Ms Payal having regard to the state of her relationship with the sponsor. The Tribunal concluded on the evidence that she did not

⁴ CB 302.

satisfy the relevant criteria, and in my view, that conclusion was open to the Tribunal on the material available to it. That material included adverse information properly put to Ms Payal at the Tribunal hearing pursuant to s.359AA of the Migration Act.

11. Ms Payal was not able to raise in argument any question concerning the legal validity of the Tribunal decision.⁵ It follows, and I find, that Ms Payal is unable to advance an arguable case of jurisdictional error by the Tribunal.
12. I will order that pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), the application is dismissed.
13. As a consequence of the dismissal of the application, the Minister seeks an order for costs in accordance with the Court scale at the time the application was filed. Ms Payal did not wish to be heard on costs.
14. I will order that the applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$3,606.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 5 September 2017

⁵ She told me from the bar table that her sponsor now lives and works in China, although she claims still to be in a relationship with him.